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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-490

GERALD MATHENY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

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IN THE

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GERALD MATHENY,
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v.

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Alabama Court of Criminal Appeals entered in the above case on February 18, 1975.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals appears as Appendix A hereto.

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JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on February 18, 1975. A Petition for Writ of Certiorari was filed by Petitioner and denied by the Alabama Supreme Court in an Order entered May 1, 1975. A copy of the Order appears as Appendix B hereto. On July 30, 1975, Mr. Justice Powell granted an extension to Petitioner to and including September 28, 1975, within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 United States Code* §1257(3).

QUESTIONS PRESENTED

1. Whether the provisions of *Title 14 Code of Alabama Section 374*, on their face and as construed and applied to authorize judgments of conviction of Petitioner herein, were, at the time of the offenses here charged, unconstitutionally vague in violation of the *First*, *Fifth*, and *Fourteenth Amendments* to the *Constitution of the United States*.

2. Whether the provisions of *Title 14 Code of Alabama Section 374*, on their face and as construed and applied to authorize judgments of conviction of Petitioner herein, are violative of the *First*, *Fifth*, and *Fourteenth Amendments* by allowing convictions based upon nonobscene material entitled to constitutional protection as a matter of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *First*, *Fifth*, and *Fourteenth Amendments* to the *Constitution of the United States*, along with *Title 14 Code of Alabama Section 374*, appear as Appendix C hereto.

STATEMENT OF THE CASE

On July 12, 1973, Petitioner was employed at Jimmy's Newstand in Montgomery, Alabama. On that date, the Petitioner sold three magazines to an employee of the State District Attorney's office; the magazines were entitled "Krazy Kittens No. 5," "Gay Blades," and "Depravity Post."

On the basis of the above described sales, Petitioner was charged with three counts of violating *Title 14 Code of Alabama Section 374 (4)*, which prohibits the commercial distribution of obscene matter. After a trial by jury, Petitioner was found guilty of all three counts on December 3, 1973. Petitioner was thereupon sentenced to imprisonment for a period of six months and assessed a fine of $500.00.

On appeal, the judgment and sentence was affirmed by the Alabama Court of Criminal Appeals in the judgment and opinion which is here sought to be reviewed. The Alabama Supreme Court subsequently denied a Petition for Writ of Certiorari, adding the following caveat:

> "In denying this writ it is not to be understood that this Court approves or disapproves all of the language used in the opinion rendered by the Court of Criminal Appeals in this case."

The statute under which Petitioner was convicted, *Title 14 Code of Alabama Section 374,* is currently before this Court in the case of *McKinney v. Alabama,* No. 74-532, *certiorari granted* June 23, 1975. The constitutionality of the statute is challenged in *McKinney* on several grounds including, *inter alia,* those raised in the instant case. The Court may therefore wish to defer disposition of this Petition pending resolution of the *McKinney* case.

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REASONS FOR GRANTING THE WRIT

I.

THE PROVISIONS OF TITLE 14 CODE OF ALABAMA SECTION 374 WERE, AT THE TIME OF THE OFFENSES HERE CHARGED, UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

State law as written or authoritatively construed, under which obscene materials are regulated, must comply with the *First Amendment* standards set forth in *Miller v. California*, 413 U.S. 15 (1973). *Title 14 Code of Alabama Section 374* as it was written at the time Petitioner was arrested, tried and convicted in these cases did not comply with the standards set by *Miller*. Nor has that statute been "authoritatively construed" to include the *Miller* safeguards.

On June 21, 1973, this Court announced its holdings in five cases which drastically changed the constitutional framework of all obscenity laws. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12-200 Ft. Reels of Film*, 413 U.S. 123 (1973). The statute under which Petitioner was convicted is unconstitutional for its failure to meet the strict specificity requirements set forth in those decisions. When judged by the standards enunciated therein, the statute under which Petitioner was convicted must be found void for vagueness.

Mr. Chief Justice Burger, in *Miller v. California, supra,* conceding the failure of this Court to set forth precise constitutional standards, writes in part as follows:

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See., e.g., Redrup v. New York, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' Interstate Circuit, Inc. v. Dallas, 390 U.S. at 704-705 (1968)." 413 U.S., at 22.

After recognizing the failure of any constitutional definition of what is obscene to be accepted by a majority of this Court, the opinion goes on to state the singular varying factor which represents a consensus of prior decisions of the Court:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment, Kois v. Wisconsin, 408 U.S. 229 (1972). United States v. Reidel, 402 U.S. 351, 354 (1972). Roth v. United States, 354 U.S. 476, 485 (1957). 'The First and Fourteenth Amendments have never been treated as absolute (footnote omitted).' Breard v. Alexandria, supra, 341 U.S. 622 at 642 (1951), and case cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, supra, 343 U.S. at 502 (1952)." 413 U.S., at 23.

Thereupon the Court goes on to state a new constitutional standard for State cases:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in the patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." 413 U.S., at 23-24, (emphasis supplied).

The opinion of Mr. Chief Justice Burger, speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future legislative enactment or authoritative judicial construction, stated:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials this his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)." 413 U.S., at 27.

Miller v. California, supra, is the key case in which this Court defined the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that the Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when the Court handed down *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that occurred in *Miller v. California*. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and the Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

The Court discussed the press materials to which the regulation would be confined, the press materials which would constitute the offense and the guide lines necessary to forewarn a potential wrongdoer. That element of the three-part test and the key guideline for the trier of fact in the new tripartite test clearly indicate the facial invalidity of the Alabama statute here:

> "Whether the work depicts or describes, in a patently offensive way, sexual conduct that is *specifically defined by the law* . . . If the state law that regulates obscene material is thus limited as written and construed, the material may be regulated." 413 U.S., at 24-25 (emphasis added).

The Alabama statute here under review has never "specifically defined" the proscribed sexual depictions as

required by the mandates of *Miller*. The Alabama Court of Appeals found such a specific definition in the case of *Pierce v. State*, 292 Ala. 473, 296 So.2d 218 (1974). The Court below quoted from the *Pierce* decision as follows:

> "... we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, 408 U.S., at 230 (1972), quoting *Roth v. United States, supra*, 354 U.S., at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value...' *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607."

It is obvious that the *Pierce* opinion does not, in and of itself, define the proscribed sexual conduct with the specificity required by *Miller*. Reading the *Miller* guidelines into a statute does not define the sexual conduct to be proscribed. Such an incorporation merely adopts the *Miller* standards, one of which requires that the state law *define* the sexual conduct to be proscribed.

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Further, even assuming *arguendo* that the *Pierce* decision provided the Alabama statute with a constitutionally acceptable authoritative construction pursuant to the mandates of *Miller*, such a construction cannot save the statute as it applies to Petitioner's conviction since the construction occurred subsequent to his conviction. The Petitioner here was convicted on December 3, 1973, for conduct which occurred on July 12, 1973. The *Pierce* decision, upon which the Court below relies, was rendered by the Alabama Supreme Court on May 9, 1974, nearly a year after the conduct which forms the basis for Petitioner's conviction.

The principle that a subsequent construction cannot save an unconstitutional statute, insofar as the statute is applicable to conduct which occurred prior to the construction, was enunciated by this Court in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Bouie* this Court reversed convictions for a crime which was "not enumerated in the statute" at the time of the alleged violating conduct. In so reversing, it was noted:

> "A deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."

It is violative of the most fundamental precepts of due process to uphold the statute under which Petitioner was convicted on the basis of a construction occurring nearly one year *after* the alleged violating conduct. At the time Petitioner engaged in the conduct complained of, he was faced only with an unconstitutionally vague statute giving little or no guidance as to the conduct proscribed.

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In summary, Title 14 Alabama Code Section 374 has never received the authoritative construction specifically defining the proscribed sexual depictions as required by *Miller*. Further, even assuming such a construction can be found in *Pierce, supra,* that construction cannot save the statute as it applies to conduct occurring prior thereto. This same argument is currently before this Court in the case of *McKinney v. Parsons,* No. 75-428, Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed September 18, 1975.

II.

THE MATERIALS INVOLVED HEREIN ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AS A MATTER OF LAW AND ARE THUS PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level was enunciated by this Court in *Jacobellis v. Ohio,* 378 U.S. 184 (1964). It was there held that the Court's duty "admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case'." *Id.,* at 188, quoting *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 488.

The continuing validity of this doctrine and of the appellate duty it imposes was affirmed by this Court only last year in *Jenkins v. Georgia,* 418 U.S. 153 (1974). *Jenkins* involved a reversal of a state obscenity conviction predicated upon an exhibition of the film "Carnal Knowledge." The

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reversal was based upon this Court's own viewing of the film, and the finding that it was not, as a matter of constitutional law, obscene. *Id.* This Court is respectfully called upon to perform the judicial duty delineated above, and thus to determine the obscenity *vel non* of the materials alleged to be obscene in the within proceedings.

Findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicitedly depicting or describing the sexual activities of its characters, including detailed and vernacular descriptions reaching the ultimate in explicitness, of heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity; e.g., *Memoirs v. Massachusetts*, supra, ("Fanny Hill"); *Aday v. United States*, 388 U.S. 441 (1967) ("Sex Life of a Cop," see description of book at 357 F.2d 855); *Corinth Publications v. Wesberry*, 388 U.S. 448 (1967) ("Sin Whisper," see description of book at 146 S.E.2d 764); *Walker v. Ohio*, 398 U.S. 434 (1970) ("Orgy Club"); *Hoyt v. Minnesota*, 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); and *Grove Press v. Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to motion picture films, the Court has reversed findings of obscenity as to films which depict totally nude women, films which show nude and partially nude women and men engaged in sexual gyrations, simulated intercourse and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Morever, this Court affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on

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the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (CA 9 1970), *affirmed sub. nom., Pinkus v. California*, 400 U.S. 922 (1970).

The press materials at bar when considered as a whole, and as judged against press materials of similar or more explicit content heretofore determined by this Court not to be obscene in the constitutional sense should thus be held protected.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX "A"

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1974-75

3 Div. 295

Gerald Matheny, alias

v.

State

Appeal from Montgomery Circuit Court

DeCARLO, JUDGE

Selling obscene matter; six months hard labor and $500. fine.

On July 12, 1973, K. W. Jones, an investigator for the District Attorney's office, went to Jimmy's News Stand in Montgomery, Alabama, and purchased from Gerald Matheny, three publications; "Krazy Kittens Number 5", "Gay Blades" and "Depravity Post".

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Appellant was charged in the county court with violation of T. 14, § 374 (4), Cumulative Pocket Part, Code of Alabama, 1940, and in November, 1973, an indictment was returned by the Grand Jury of Montgomery County. The indictment contained three separate counts charging appellant with selling, exhibiting or commercially distributing non-mailable and obscene printed or written matter or material to K.W. Jones. Each count was the same except for charging appellant with the above offense as to each of the different publications.

Among the grounds asserted by appellant on demurrer to the indictment were (1) the State's failure to show under which statute it was proceeding and (2) that the accusation charging appellant with commercially distributing "non-mailable" and obscene printed or written material or matter was vague and misleading. The demurrer was overruled and a motion to suppress denied. Subsequently, a jury found appellant guilty on all counts.

I

Appellant asserts he has been denied equal protection of the law under the Constitutions of the United States and the State of Alabama. Counsel argues each of the statutory enactments pertaining to obscenity, (T. 14), § 374 (1) (16), September 8, 1961, (under which this prosecution was based) and (T. 14), § 374 (16j-o), both acts being found in Cumulative Pocket Parts, Code of Alabama, 1940, have different definitions of the same offense and contain different punishment. He insists this double standard precludes the trial court from clearly instructing the jury.

The thrust of this argument is that the interpretation of "obscenity" is so indefinite and uncertain, an offense cannot readily or clearly be defined.

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This contention fails under *Pierce v. State*, 292 Ala. 473, 296 So.2d 218, wherein the Alabama Supreme Court incorporated the "Miller" tests into its construction of the word "obscene".

Pierce, supra, provides reasonable standards of guilt, which were adopted from these *Miller* guidelines:

> ". . . we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the pruient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the pruient interest, *Kois v. Wisconsin*, supra, 408 U.S., at 230 (1972), quoting *Roth v. United States*, supra, 354 U.S., at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c)whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . ."*Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607.

Although the Alabama obscenity statutes may not portray the precision necessary to weather all criticism, they do not offend due process requirements. These statutes are cumulative and set forth the offense intended to be punished.

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> ". . . '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices* * *.' *United States v. Petrillo,* 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark' * * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *'. . ." *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304.

Under the *Miller* standards, as engrafted by *Pierce*, supra, we believe adequate warning of indictable conduct is present and affords judges and juries a distinct purview in which to administer the law.

Next, the appellant's complaint concerning the difference in punishments is unsupported. A careful reading of both statutes indicates the range of punishment is the same for *selling*.

II

Appellant contends the court erred in not permitting introduction of alleged comparable material available in the community, and testimony relating to so-called "x-rated" movies shown in the vicinity.

The availability of similar materials in a community does not automatically make them admissible as tending to prove the non obscenity of the publications the appellant is charged with selling.

> ". . . the mere fact that materials similar to the brochure at issue here 'are for sale and purchased at book stores around the country does not make them witnesses of virtue.' 481 F.2d, at 30. Or, as put by the Court of Appeals in *United States v. Manarite*, 448 F.2d 583 (CA2 1971):
>
> ". . . 'Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities." *Hamling v. U.S.*, 94 S.Ct. 2887.

The rejection of this evidence was proper. *McKinney v. Birmingham*, 52 Ala. App. 605, 296 So.2d 197, cert. den., 292 Ala. 726, 296 So.2d 202, and authorities cited therein.

It is insisted that the introduction of the alleged obscene publications without expert testimony of a community standard was a denial of due process.

The Supreme Court of the United States in *Hamling*, supra, emphasized that jurors had the ability, without the benefit of expert testimony, to ascertain the sense of the "average person" in applying community standards.

In the case at bar, the jurors were entitled to draw on their own knowledge in determining the view of the average person of their community concerning what was considered obscene. *Hamling*, supra.

The materials were sufficient in themselves for resolving the issue. *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680.

IV

Finally appellant argues that the trial court was in error when it allowed the State to cross-examine a witness called on as an expert in this manner:

> "Q. (By Mr. Thomas): Have you found that it is the community standard in Montgomery, Alabama, that it is accepted in Montgomery, Alabama, that these books be sold – not that the books – You testified that a book just like this is sold at a Pak A Sak. (Referring to State's Exhibit No. 3.) "A. Well, - - -
>
> "Q. I want to see the book. But you testified that it is sold at the Pak A Sak. Is it your testimony that it is accepted as a community standard in Montgomery, Alabama that these type pictures, such as this (Indicating), be sold in Montgomery, Alabama? "A. *I would say that the fact that they are sold and the people buy them is prima facie evidence that they are accepted within the community.* (Emphasis added)
>
> "Q. Why would you say that? "A. Well, I think it's fairly obvious that if they are sold and people buy them, then somebody is buying them within the community.
>
> "Q. Well, do you know whether or not marijuana is sold within this community?
>
> "(Mr. Lowery): Your Honor, we object to any marijuana; that's a prejudicial against - - -
>
> "(Mr. Thomas): This cross examination, and I want to know what this witness is [sic] statement is all about; what is his opinion based on?

"Q. (By Mr. Thomas): Do you know whether or not marijuana is sold in Montgomery, Alabama?

"(Mr. Lowery): We object, that's not - - -

"(Mr. Thomas): This is a comparison and an analogous situation, Judge; both of them are against the law.

"(Mr. Lowery): If we're going to go into marijuana, Judge, we'll have to get an indictment.

"(The Court): Gentlemen, you all are going to get me in a verdict direct, because I'm going to make some observations here directly.

"(Mr. Lowery): We object, your Honor.

"(The Court): I'm going to sustain the objection.

"Q. (By Mr. Thomas): All right. I'll ask you another question. Do you know - - would you consider the fact that because marijuana is sold in Montgomery, Alabama that it is accepted as a community standard for marijuana to be sold?

"(Mr. Lowery): Objection.

"(The Court): No, I don't think that question was covered, Mr. Thomas, as a community standard.

"(Mr. Thomas): Well, he stated that because a book is sold in a book store, Your Honor, that therefore ergo, it would be accepted by the community.

"(The Court): Well, the marijuana proposition wouldn't be accepted as a standard, except as a medication or a drug.

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"(Mr. Thomas): I understand.

"(The Court): Well, rephrase your question.

"(Mr. Thomas): Now, what did you say, excuse, Judge. I'm asking you how to ask it so I can get it in. I want to know whether or not he thinks it is a community standard.

"(The Court): *The fact that marijuana is sold and used in Montgomery, is that accepted as a community standard as a medication or as a medicine?* (Emphasis added)

"(Mr. Lowery): Note our objection to the court's question.

"(The Court): Well, the court is going to overruled [sic] your objection to that. (Laughter). now, go ahead and answer it, please sir.

"(The Witness): Judge, would you repeat that question? (Laughter).

"(The Court): Read it back to him, Mr. Reporter. (Whereupon, the reporter read the question back to the witness.)

"(The Court): You understand that question?

"(The Witness): This question presumes that I have knowledge that marijuana is sold in Montgomery. I have no personal knowledge that marijuana is.

"(The Court): No, it doesn't presume that either.

"(The Witness): Well, the fact that it is sold, if that is a fact - - -

"(The Court): Well, you read it - - I don't have knowledge of it – but you read it in the paper where they try these marijuana cases.

"(The Witness): I do know from what I read in the papers.

"(The Court): All right. Go ahead and answer the question, if you can.

"(The Witness): *It is a medication, I would say, no. As I understand the question, I would say no.* (Emphasis added)

"(The Court): That answers it.

"(Mr. Lowery): We move to exclude that answer.

"(The Court): Overruled.

"(Mr. Lowery): We move for a mistrial.

"(The Court): Overruled.

"(Mr. Lowery): All right, your Honor, we except."

Counsel argues that this testimony of unrelated conduct by way of hypothesis was irrelevant to the offense charged. It is his contention that selling marijuana is a separate criminal offense, and this testimony implied the sale of the publications in evidence was no more justified than a sale of marijuana.

In *George v. State*, 240 Ala. 632, 200 So. 602, Justice Livingston wrote:

> "Expert witnesses may be cross-examined and their opinion obtained based on other states of facts assumed by the party examining them to have been proved upon a hypothetical case; and they may be cross-examined on purely imaginary and abstract questions. Such questions are not only permissible in order to get the opinion of the expert witness upon all possible theories of the case, *but they are allowed to test the value and accuracy of the opinion of the witness himself.*" (Emphasis added).

It is our judgment that the question under review was an attempt to test the value and accuracy of the witness's opinion in how he arrived at a community standard. Further, in view of the witness's negative answer, the appellant suffered no prejudice. The court's ruling was proper.

We have examined the publications presented in the case and find them obscene. Our review of the record and the material seems to require this comment. Anyone reading Chaucer's "Canterbury Tales" for the first time would be unable to comprehend its meaning without some extrinsic knowledge or aid. It is our observation, however, that a person reading or reviewing the printed matter in this case needs nothing more to insure his comprehension than the ability to see and read.

AFFIRMED.

All the Judges concur.

APPENDIX "B"

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1974-75

Ex Parte: Gerald Matheny

PETITION FOR WRIT OF CERTIORARI

TO COURT OF CRIMINAL APPEALS

S.C. 1238

(Re: Gerald Matheny

v.

State of Alabama)

FAULKNER, JUSTICE.

In denying this writ it is not to be understood that this court approves or disapproves all of the language used in the opinion rendered by the Court of Criminal Appeals in this case.

WRIT DENIED.

Heflin, C.J., Bloodworth, Almon and Embry, JJ., concur.

1. J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 1 day of May 1975.

/s/ J.O. Sentell

Clerk, Supreme Court of Alabama.

APPENDIX "C"

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

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State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 14 ALABAMA CODE §374

"(a) Section 374(3):

"'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"(b) Section 374(4):

"Importation, sale or possession of obscene printed or written matter; penalties –
"[1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, on in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court. "[2] Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable

matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-490

GERALD MATHENY,
PETITIONER

VS.

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Criminal Appeals affirming the judgment of the Circuit Court of Montgomery County is reported as follows:

Matheny v. State, 313 So. 2d 547, 54 Ala. App. ____ (1975)

The opinion of the Supreme Court of Alabama denying a Petition for Writ of Certiorari is reported as follows:

Matheny v. State, 313 So. 2d 552, ____ Ala. ____ (1975)

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JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28 United States Code Section 1257(3).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Miller v. California* renders invalid the definition of obscenity as set out in Title 14 Section 374(3) of the Code of Alabama.
2. Whether the materials involved in this case are obscene and therefore not protected by the constitution.

STATUTORY PROVISIONS INVOLVED

Title 14 Section 374(1) - 374(16) of the Code of Alabama.

STATEMENT OF THE CASE

On July 12, 1973, K. W. Jones, an investigator for the District Attorney's Office, went to Jimmy's News Stand in Montgomery, Alabama, and purchased from Gerald Matheny three publications; *Krazy Kittens Number 5*, *Gay Blades*, and *Depravity Post*.

The Petitioner was charged in the county court with violation of Title 14 Section 374 (4), Cumulative Pocket Part, Code of Alabama, 1940, and in November, 1973, an indictment was returned by the Grand Jury of Montgomery County. After a trial by jury, the Petioner was found guilty on December 3, 1973. Petitioner was sentenced to imprisonment for a period of six months and assessed a fine of $500.00.

The judgment of the trial court was affirmed by the Alabama Court of Criminal Appeals on February 18, 1975.

The Alabama Supreme Court denied a petition for writ of certiorari on May 1, 1975.

ARGUMENT

The Petitioner argues that the Alabama obscenity statute is invalid because of this Court's decision in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). According to the Petitioner, the *Miller* decision renders the statute invalid as being vague because the new standards set out in *Miller* had not been engrafted into the Alabama statute by judicial construction at the time of the Petitioner's conviction.

This argument had been expressly rejected in the case of *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d. 590, 94 So. Ct. 2887 (1974). In *Hamling* this Honorable Court once again approved Title 28 U.S.C. 1461, a criminal statute outlawing the mailing of obscene materials. 18 U.S.C. 1461 refers to obscene materials in the following words: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance. . . ." The State statute, at issue, on the other hand, defines "obscene" this way: "Obscene means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to purient interest." Title 14 Section 374(3), Appendix "C" of the Petitioner's brief, page A.14.

This language is considerably more definite than that approved in *Hamling*.

At page 616 of 41 L. Ed. 2d this Honorable Court stated in *Hamling:* "In *Roth v. United States*, 354 U.S. at 419, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) we upheld the con-

stitutionality of 18 U.S.C. §1461 [18 U.S.C. §1461] against a contention that it did "not provide reasonably ascertainable standards of guilt and therefore violate[s] the constitutional requirements of due process. . . ." The Court then went on to mention other cases in which the constitutionality of the federal statute had been upheld.

The Court in *Hamling* emphasized on page 617 of the opinion that:

> "At no point does *Miller* or any of the other obscenity decisions decided last term intimate that the constitutionality of pre-Miller convictions under statutes such as 18 U.S.C. §1461 [18 U.S.C.S. §1461] was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller*, 413 U.S. at 24 N 6, 37 L. Ed. 2d 419, that our decision was not intended to hold all state statutes inadequate and we clearly recognized that existing statutes 'as construed heretofore or hereafter, may be adequate.' . . ."

The Court in *Hamling also* specifically rejects the case of *Bouie v. City of Columbia*, 378 U.S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964), relied on by the Petitioner. The Court stated at page 620 of L. Ed. 2d:

> "Nor do we find merit in petitioners' contention that cases such as Bouie v. City of Columbia, 378 US 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964), require reversal of their convictions. The Court in Bouie held that since the crime for which the petitioners there stood convicted was 'not enumerated in the statute' at the time of their conduct, their conviction could not be sustained. Id. at 363, 12 L. Ed. 2d 894. The Court noted that 'a deprivation of the right of fair warning can re-

sult not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.' Id., at 352, 1 2L. Ed. 2d 894. *But the enumeration of specific categories of material in Miller which might be found obscene did not purport to make criminal, for the purpose of USC §1461 [18 USCS §1461], conduct which had not previously been thought criminal.* That requirement instead added a 'clarifying gloss' to the prior construction and therefore made the meaning of the federal statute involved here 'more definite' in its application to federal obscenity prosecutions. Bouie v. City of Columbia, supra, at 353, 12 L. Ed. 2d 894. Judged by both the judicial construction of §1461 prior to Miller, and by the construction of that section which we adopt today in the light of Miller, petitioners' claims of vagueness and lack of fair notice as to the proscription of the material which they were distributing must fail." (emphasis supplied)

Thus the argument of the Petitioner has been expressly rejected by this Court as recently as June of 1974. Respondent respectfully submits that the Petitioner has not raised any new reasons for causing this Court to reconsider its decision in *Hamling*.

II

This Honorable Court has before it the materials involved in the prosecution of the Petitioner. Respondent respectfully invites the Court to determine for itself that the materials are obscene and therefore not entitled to protection under the constitution. Obscene materials are utterly without First Amendment protection. *Rosen v. United States*, 161 U.S. 29, 40 L. Ed. 606, 16 S. Ct. 434 (1896); *Roth v.*

United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957); *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 92 S. Ct. 2607 (1973); *Hamling v. United States*, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974).

CONCLUSION

In conclusion, the State of Alabama, Respondent, respectfully submits that the decision of the Alabama Court of Criminal Appeals is correct and that the Petitioner was properly convicted. The Respondent therefore respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David W. Clark, an assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, one of the attorneys for the Respondent, do hereby certify that on this _____ day of November, 1975, I did serve the requisite number of copies of the foregoing Brief and Argument of the Respondent on the Attorneys for the Petitioner by mailing said copies to them, first class postage prepaid, and addressed as follows:

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